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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

AVENUE BOOK STORE,

Petitioner,

—vs—

CITY OF TALLMADGE, OHIO,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF OHIO

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

Whether a court order entered in a civil nuisance abatement proceeding which enjoins the future use of the rear portion of a bookstore for the sale, exhibition or display of unknown and unreviewed materials constitutes an unconstitutional prior restraint of petitioner's First Amendment right to free expression?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

No. _____

AVENUE BOOK STORE,

Petitioner,

-vs-

CITY OF TALLMADGE, OHIO,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner Avenue Book Store prays that a writ of certiorari issue to review the judgment of the Ohio Supreme Court dismissing petitioner's appeal for want of substantial constitutional question. The dismissal of petitioner's appeal by the Ohio Supreme Court thereby affirmed .

the judgment of the Ohio Court of Appeals - Ninth Appellate District, which in part affirmed the trial court's order enjoining the operation of petitioner's bookstore and closing the rear portion of the bookstore.

OPINIONS BELOW

The judgments of the Ohio Supreme Court dismissing petitioner's appeal and denying rehearing are unreported and are set forth, respectively, in the Appendix at 26 and 24 . The judgment and opinion of the Ohio Court of Appeals - Ninth Appellate District, is unreported and is set forth in the Appendix at 28-70 . The journal entries of the Court of Common Pleas of Summit County, Ohio, the trial court, are set forth in the Appendix at 71-85 .

JURISDICTION

The judgment of the Ohio Supreme Court dismissing petitioner's appeal as

of right was announced on February 24, 1982, Appendix at 26. Petitioner's motion for rehearing was denied by the Ohio Supreme Court on March 24, 1982, Appendix at 24.

This petition seeks review of a final judgment rendered by the Ohio Supreme Court, the highest court in Ohio in which a decision in this case could be had. This Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because rights, privileges and immunities under the Constitution of the United States are claimed to have been violated.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States are set forth in the Appendix at 88-89.

STATEMENT OF THE CASE

This petition seeks review of a dismissal by the Ohio Supreme Court of

an appeal from the decision of the Ohio Court of Appeals for the Ninth Appellate District which affirmed with minor modification the trial court's issuance of a permanent injunction against the use of the rear portion of Avenue Book Store for the exhibition and sale of unknown, unreviewed sexually-oriented materials. Petitioner's appeal to the Ohio Supreme Court was dismissed for want of substantial constitutional question and rehearing was denied.

A common law nuisance action was commenced in the Summit County Common Pleas Court by the City of Tallmadge, Ohio, to enjoin petitioner Avenue Book Store from the display and sale of 197 films, books, magazines and sexual aids and devices and to enjoin petitioner bookstore from further operation of its bookstore business. Trial of this case was held on August 19, 1980, before

a visiting judge sitting by assignment in the Common Pleas Court of Summit County, Ohio. Further proceedings were held on October 9, 1980, during which the trial court viewed nine (9) films which had been introduced as exhibits and conducted a cursory examination of other exhibits.

On January 9, 1981, the trial court entered judgment against the petitioner. The trial court enjoined Avenue Book Store from the display and sale of 197 exhibits which had been received in evidence upon a finding that they were obscene even though the court actually had examined only a small fraction of the materials that comprised the 197 exhibits. The trial court also decreed:

> In abatement of the nuisance itself, the rear portion of defendant's store (that portion devoted to a sexual orientation and setting) as presently constituted and being the situs of the nuisance, is ordered <u>closed forthwith</u> and defendant is

not permitted to use it for any similar purpose.

(Emphasis added). App. at 75-76 .

Petitioner appealed the trial court's judgment after its motion to enter separate findings and conclusions of law was granted by the trial court on January 20, 1981.

On appeal, the Ohio Court of Appeals for the Ninth Appellate District, over a strong dissent and in apparent contradiction to its finding that the trial judge could enjoin only those exhibits which he had actually reviewed and found obscene, upheld the trial court's injunction against unknown, unreviewed materials by approving, with minor modification, an injunction against the use of the entire rear portion of the bookstore for the display and sale of adult materials. The nuisance abatement order, as modified

by the court of appeals, provided:

> In abatement of the nuisance, defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by R.C. 2907.01 and interpreted by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354.

App. at 47 .

Finding an absence of necessary procedural protections, Judge Mahoney vigorously dissented from the majority's affirmance of the abatement order. In reaching this conclusion, he explained:

> The injunction as rewritten by the majority constitutes a blanket injunction against the future exhibition, display or sale of obscene materials...In essence, the injunction restrains future sales of material not yet adjudicated to be obscene on the basis of appellant's past conduct.

App. at 60-61. He further noted:

> I believe this is the very type of restraint on future expression the Supreme Court

has continually rejected from Near v. Minnesota (1931) 283 U.S. 697 to Vance v. Universal Amusement Co., Inc., supra.

App. at 61 .

Petitioner appealed the ruling of the court of appeals to the Ohio Supreme Court. The court dismissed the appeal for want of a substantial constitutional question. Petitioner then moved for rehearing which was subsequently denied by the Ohio Supreme Court on March 24, 1982.

Petitioner now seeks review by this Court of the dismissal of the appeal by the Ohio Supreme Court of the decision rendered by the Ohio Court of Appeals for the Ninth Appellate District which is in conflict with the decision of this Court in Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980) and with the decisions of various state and federal courts.

REASONS FOR GRANTING THE WRIT

AN IMPORTANT QUESTION IS PRESENTED, ON WHICH STATE AND FEDERAL COURTS ARE IN CONFLICT, AS TO WHETHER A COURT ORDER WHICH ENJOINS THE FUTURE USE OF THE REAR PORTION OF PETITIONER BOOKSTORE FOR THE EXHIBITION, SALE OR DISPLAY OF UNKNOWN AND UNREVIEWED MATERIALS IS AN UNCONSTITUTIONAL PRIOR RESTRAINT IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS AND, THEREFORE, IS IN CONFLICT WITH THIS COURT'S DECISION IN VANCE v. UNIVERSAL AMUSEMENT CO., INC., 445 U.S. 308 (1980).

This Court, in Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980), addressed the issue of prior restraints in the context of, what it termed, an "unusual obscenity case." In Vance, the State of Texas appealed a ruling by the Court of Appeals for the Fifth Circuit which found the Texas nuisance statute unconstitutional because it authorized a prior restraint of films not found to be obscene. 587 F. 2d 159 (5th Cir. 1978) (en banc). In

urging this Court to reverse the Court of Appeals decision, Texas argued that the restraint imposed by the nuisance statute was "no more serious than that imposed by Texas' criminal statutes and that it [was therefore constitutional." 445 U.S. at 309. This Court found that argument to be untenable.

In rejecting that analysis, this Court thoroughly reviewed the prior rulings of the district court and the court of appeals which concluded that a state court injunction against the future exhibition of unknown and unreviewed films offended the very essence of First Amendment rights. Finding the reasoning of the lower courts to be compelling, this Court stated:

> The Court of Appeals was quite correct in concluding both (a) that the regulation of a communicative activity such as the exhibition of motion pictures must adhere to more narrowly drawn procedures than is necessary

> for the abatement of an ordinary nuisance, and (b) that the burden of supporting an injunction against a future exhibition is even heavier than the burden of justifying the imposition of a criminal sanction for a past communication.

Id., at 315-316. Accordingly, the Court ruled that the constitutional deficiencies of the Texas nuisance statute precluded its enforcement. Id., at 317.

Despite the fact that this Court unambiguously announced that it found the State's position unpersuasive and found the statute unconstitutional, the Ohio Court of Appeals for the Ninth Judicial District reiterated the argument set forth by Texas to justify the invalid prior restraint effected by its order against petitioner in the case at bar. The Ohio Court of Appeals upheld the closure order issued by the trial court, with the following modification:

> In abatement of the nuisance, defendant is enjoined from utilizing the rear section

> of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene as defined by R.C. 2907.01 and interpreted by the Ohio Supreme Court in State v. Burgun (1978), 56 Ohio St. 2d 354.

App. at 47. The court, attempting to reconcile its injunction with First Amendment precepts, stated:

> [T]he injunction, at issue here, is no different from the operation of the Ohio criminal statutes on obscenity...Therefore, the injunction sanctioned by this opinion places no greater burden on appellant or his First Amendment rights than does the existing criminal law which imposes punishment only after a violation and proof of obscenity.

App. at 50.

The court below pursued an analysis rejected in Vance, improperly reasoning that because punishment for violation of the injunction would be invoked only after contempt proceedings, the injunction did not act as an invalid prior

restraint. Yet, as Judge Mahoney observed in his vigorous dissent, App. at 58-70, contempt proceedings under Ohio law lack a significant number of procedural safeguards such as a right to a jury trial,[1] Ohio v. Weiner, 37 Ohio St. 2d 11 (1974), and an assurance that the State must prove its case beyond a reasonable doubt, Brown v. Executive Zoo, Inc., 64 Ohio St. 2d 250 (1980) (App. at 66). The abatement order is, in fact, quite different from the state criminal statutes on obscenity. Essentially, the order constitutes the more dangerous "suppression by a stroke of

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[1] The importance of the right to a jury trial cannot be overemphasized in the context of an obscenity prosecution, for it is the jury that is charged with the duty of drawing upon its experience and knowledge to determine the contemporary community standards. Smith v. United States, 431 U.S. 291, 304 (1977); Hamling v. United States, 418 U.S. 87, 105 (1974).

the pen" rather than suppression through the criminal process in which the defendant's rights are accorded established procedural safeguards. See T. Emerson, The System of Freedom of Expression 506 (1960).

In upholding the abatement order, the court below departed from this Court's recognition of the important distinction between criminal sanctions and prior restraints. As this Court explained in Nebraska Press Association v. Stuart, 427 U.S. 539 (1976):

> [P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

> A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.

Id., at 559 (Emphasis added)(footnotes omitted).

Thus, the Ohio courts, rather than acknowledge the importance of employing procedures sensitive to petitioner's First Amendment rights, Speiser v. Randall, 357 U.S. 513 (1958), approved a practice rejected by this Court in Vance which was seriously deficient in affording adequate protection of petitioner's constitutional rights.

State courts that have reviewed nuisance abatement orders enjoining the future exhibition or sale of unreviewed obscene materials and/or ordering the closure of a store or theater which has

exhibited or sold obscene materials, have reached conflicting conclusions as to their constitutionality.[2] However, the

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[2] Although courts have reached conflicting results, the majority have determined that such abatement orders are unconstitutional. General Corp. v. State ex rel. Sweeton, 294 Ala. 657, 320 So. 2d 668 (1975), cert. denied, 425 U.S. 904 (1976); People ex rel. Busch v. Projection Room Theatre, 17 Cal. 2d 42, 550 P. 2d 600, cert. denied, 429 U.S. 922 (1976); Mitchem v. State ex rel. Schaub, 250 So. 2d 883 (Fla. 1971); Sanders v. Georgia, 231 Ga. 608, 203 S.E. 2d 153 (1974); Indiana ex rel. Blee v. Mohney Enterprises, 154 Ind. App. 244, 289 N.E. 2d 519 (1st Dist. 1973); Kansas v. A Motion Picture Entitled "The Bet", 219 Kan. 64, 547 P. 2d 760 (1976); Gulf States Theatres of Louisiana v. Richardson, 287 So. 2d 480 (La. 1974); Parish of Jefferson v. Bayou Landing Limited, Inc., 350 So. 2d 158 (La. 1977); State ex rel. Field v. Hess, 540 P. 2d 1165 (Okla. 1975); New Riviera Arts Theatre v. State ex rel. Davis, 219 Tenn. 652, 412 S.W. 2d 890 (1967); News Mart, Inc. v. State ex rel. Webster, 561 S.W. 2d 752 (Tenn. 1978); Napro Corp. v. Berlin, 135 Vt. 353, 376 A. 2d 342 (1977); Cf. State ex rel. Ewing v. Without A Stitch, 37 Ohio St. 2d 95, 105, 307 N.E. 2d 911, 918 (1974), appeal dismissed sub nom. Art Theater Guild, Inc. v. Ewing, 421 U.S. 923 (1975). However, several courts have upheld similar abatement orders, State ex rel. Cahalan v. Diversified Theatrical Corp., 59 Mich. App. 223, 229 N.W. 2d 389 (1975), and a few, even after this Court's decision in Vance. State ex rel. Andrews v. Chateau X, Inc., 296 N.C. 251, 250 S.E. 2d 603 (1979), vacated and remanded, 445 U.S. 947 (1980), reaffirmed, 275 S.E. 2d 443 (N.C. 1981); State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P. 2d 622 (1981), prob. juris. noted, No. 81-741, ___ U.S. ___, 102 S.Ct. 996, 50 U.S.L.W. 3547 (January 12, 1982), dismissed pursuant to Rule 53 (March 10, 1982), 50 U.S.L.W. 3751 (March 23, 1982).

vast majority have reached conclusions opposite to the Ohio court's decision.

For example, in Sanders v. State, 231 Ga. 608, 203 S.E. 2d 153 (1974), the Supreme Court of Georgia held, with one dissenter, that:

> The injunction closing this store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby precluding the application of the above procedural safeguards and creating an unconstitutional restraint upon appellant. This broad result cannot be reconciled with free expression under our Constitution.

Id., at 613, 203 S.E. 2d at 157.

In two separate decisions, the Tennessee Supreme Court reached the same conclusion. In New Riviera Arts Theatre v. State ex rel. Davis, 219 Tenn. 652, 412 S.W. 2d 890 (1967), the court held that:

> The statute does not authorize an injunction to restrain the acquisition and display of unidentified films...which

> a court might in the future hold to be obscene. Such a construction of the statute would vest in the courts an unlimited power of prior restraint on the freedom of speech and press.
>
> Such an interpretation would also place the burden upon the defendants of determining whether any film they might acquire might be classified by the court as obscene material.

Id., at 663, 412 S.W. 2d at 895. The Tennessee Supreme Court reaffirmed its prior holding in News Mart, Inc. v. State ex rel. Webster, 561 S.W. 2d 752 (1978).

Recently, this Court affirmed, without opinion, a Ninth Circuit decision finding that the Washington moral nuisance law effected an unconstitutional prior restraint. Spokane Arcade, Inc. v. Brockett, ___U.S.___, 102 S.Ct. 557 (1981). In Spokane Arcade, Inc. v. Brockett, 631 F. 2d 135 (9th Cir. 1981), the Ninth Circuit determined that the statutory scheme under which proceedings to abate nuisances could be brought did not afford

sufficient safeguards to avert the danger of imposing an unconstitutional prior restraint on literature and films protected by the First Amendment. By affirming Spokane Arcade, this Court again emphasized the importance of procedural safeguards in averting impermissible infringement on First Amendment rights.

Despite the significant authority ruling abatement orders similar to that in the case at bar unconstitutional, Ohio together with Idaho and North Carolina has chosen to uphold such prospective injunctive relief and closure orders. Both the courts in State ex rel. Kidwell v. U.S. Marketing, Inc., 102 Idaho 451, 631 P. 2d 622 (1981), prob. juris. noted, No. 81-741, __U.S.___, 102 S.Ct. 996, dismissed pursuant to R. 53 (March 10, 1982), and Chateau X, Inc. v. North Carolina, 275 S.E. 2d 443 (N.C. S.Ct. 1981), held that abatement orders, nearly identical to those ruled unconstitutional in Sanders

v. State, 231 Ga. 608, 203 S.E. 2d 153 (1974), State ex rel. Field v. Hess, 540 P. 2d 1165 (Okla. 1975) and People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 550 P. 2d 600 (1976), did not constitute unlawful prior restraints. Indeed, the Idaho Supreme Court acknowledged that it reached its conclusion "fully aware that a number of states have held that closure provisions constitute improper prior restraints." State ex rel. Kidwell v. U.S. Marketing, Inc., supra, 102 Idaho at , n. 10, 631 P. 2d at 629, n. 10. The decision of the Ohio courts in the case at bar serves to nurture the conflict existing among the state and federal courts and with decisions of this Court. While an individual can be assured that his or her First Amendment rights will be fully protected in Alabama, Vermont, Kansas, and other states, he or she can receive no such assurance upon

crossing the borders into Ohio, Idaho or North Carolina.

Petitioner's First Amendment rights are presently being drastically curtailed by a state court order of indefinite duration which operates as a sweeping ban against controversial literature and other materials. This court has been ever vigilant against encroachment of prior restraints upon an individual's right of free expression, see, Near v. Minnesota, 283 U.S. 697 (1931); Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); Freedman v. Maryland, 380 U.S. 51 (1965); Bantam Books v. Sullivan, 372 U.S. 58 (1963); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Vance v. Universal Amusement Co., Inc., 445 U.S. 308 (1980).

Moreover, this Court recently acted to resolve the conflict on the identical question presented in this case by noting

probable jurisdiction in U.S. Marketing, Inc. v. Idaho, __U.S.__, 102 S.Ct. 996 (1982). However, U.S. Marketing was dismissed on March 10, 1982, pursuant to Rule 53, by petitioner. 50 U.S.L.W. 3751 (March 23, 1982). This case presents an opportunity to consider the identical issue withdrawn by the petitioner in that case.

Therefore, petitioner respectfully urges that certiorari should be granted not only to provide continued protection to the constitutional guarantees to free expression, but to resolve a question upon which there is conflict among state and federal courts.

CONCLUSION

The courts below chose to reject the collective wisdom of numerous courts and charted a course in clear conflict with those decisions and the decisions of this Court. The urgent questions raised by the abatement order demand an answer. Presently, states in every part of the

nation are in marked disagreement over how to reconcile nuisance abatement proceedings with the First Amendment. In attempting to obtain such reconciliation, the courts confronted with the issue have not only reached decisions in conflict with one another but have also made determinations in clear conflict with the decisions of this Court. State and federal courts alike are presently in need of clarification and guidance which can be supplied only by this Court on a question of pressing importance to the protection of free and untrammeled expression.

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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